

OLAN W. CHRISTIE  
v.  
LARRY E. O'GLESBEE

IBLA 76-92

Decided December 23, 1975

Appeal from decision of the Alaska State Office, Bureau of Land Management, dismissing private contest complaint (AA 8351-B) against a homestead entry (AA 8351).

Affirmed.

1. Alaska: Homesteads--Homesteads (Ordinary): Contests--Rules of Practice: Private Contests

A private contest brought against an Alaskan homestead entry charging that the entryman failed to meet the minimum cultivation requirements for the second entry year must be dismissed when it is disclosed that such information was of record in the Bureau of Land Management office at the time the complaint was filed.

APPEARANCES: Olan W. Christie, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Olan W. Christie has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 9, 1975, summarily dismissing his contest complaint (AA 8351-B) against the homestead entry of Larry E. O'Glesbee (AA 8351). 1/

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1/ Pursuant to section 2 of the Act of May 14, 1880, as amended, 43 U.S.C. § 185 (1970), a person who by contest has procured the cancellation of a homestead entry has a preference right of entry for the lands in the cancelled entry.

Larry E. O'Glesbee filed notice of location of settlement for the E 1/2 NW 1/4 of Section 23, T. 20 N., R. 9 E., Seward Meridian, Alaska, on April 5, 1973. A homestead entry application for the same land was filed by O'Glesbee on May 21, 1973.

On March 10, 1975, Olan W. Christie filed a contest complaint (AA 8351-A) against O'Glesbee's homestead entry (AA 8351). The complaint charged essentially that O'Glesbee failed to establish residency on the entry within 6 months after the date of entry. On March 28, 1975, the BLM summarily dismissed the complaint stating that a contest complaint which alleges facts reflected in the BLM records must be dismissed. Christie did not appeal such decision.

On April 22, 1975, Christie filed a second contest complaint (AA 8351-B) against the O'Glesbee homestead entry (AA 8351) wherein he alleged that O'Glesbee had failed to meet the minimum cultivation requirements for the second entry year. No answer was filed by O'Glesbee.

On June 9, 1975, the BLM summarily dismissed the contest complaint. The basis for the dismissal was two-fold. First, the decision stated that the facts alleged by contestant were documented in the homestead claim case file and were a matter of public record and, therefore, could not support a contest complaint. In addition, the decision stated that contestant failed to file proof of service of the contest complaint on contestee and dismissal is required by 43 CFR 4.450-5(a).

Appellant filed a timely appeal and in his statement of reasons he alleges certain facts surrounding the action taken on his first contest complaint (AA 8351-A). He states:

Even though I instituted a new Contest instead of appealing the old one I feel that this second Contest is a continuation of the first by reason of being filed within the 30-day appeal period.

Appellant's failure to appeal the first contest resulted in the BLM decision relating to that contest becoming final. Even though the second contest was filed within the 30-day appeal period, the second contest is not a continuation of the first. To keep the first contest alive appellant should have appealed. Cf. Kendall v. Long, 119 P. 9 (Wash. 1911). Instead, he elected to file a second contest which must be considered an entirely new action.

Appellant states that following the summary dismissal of his first contest he examined the homestead claim (AA 8351) case file again and filed his second contest on April 22, 1975. On April 21, 1975, unknown to appellant, Larry O'Glesbee visited the BLM office

in Anchorage and informed BLM personnel that he wished to amend the homestead claim to make it a 5-acre homesite. He stated that he had been unable to perform any clearing or cultivation due to access problems with his neighbors. The substance of Larry O'Glesbee's conversation with BLM personnel was summarized by a BLM employee in a memorandum to the homestead claim case file. The memorandum was placed in the case file on April 21, 1975.

Appellant contends that since his second contest and the statements of his witnesses were all notarized on April 20, 1975, one day before the memorandum was placed in the case file, the contest and such statements became matters of public record when they were notarized.

[1] Such a contention is meaningless. The date the contest complaint is signed or notarized is not controlling as to the initiation of a contest. The date upon which a contest is initiated is the date upon which the complaint is filed with the proper land office. See 43 CFR 4.450-3. That date was April 22, 1975. On such date the official records of the BLM showed that the entryman had failed to cultivate in his second entry year. <sup>2/</sup> Since such information was of record in the official BLM files at the time the contest was filed, the charge of lack of cultivation did not support the contest and the complaint was properly dismissed. See 43 CFR 4.450-1 and 4.450-5(a); Dale Johnson, A-30806 (September 17, 1968); Stephens, Jr. v. Moen, A-30350 (August 19, 1965); Gilbert v. Oliphant, 70 I.D. 128 (1963).

BLM's second ground for dismissal of the complaint was contestant's failure to file proof of service of a copy of the complaint pursuant to 43 CFR 4.450-5(a). Appellant claims that he, in fact, sent a copy of the contest by certified mail to the contestee and that a signed return receipt card was returned to him. Appellant states that he took the return receipt card to the BLM office and the clerk wrote the case file number on the card and assured appellant she would place it in the case file.

Such a card is included in the case file (AA 8351-B), having been stamped in at the BLM office on May 5, 1975. While we cannot be absolutely certain that such card represents the receipt of the contest complaint by Mr. O'Glesbee, we have no reason to doubt appellant's assertions on this point. However, even assuming compliance by appellant with the proof of service requirements, it is

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<sup>2/</sup> In fact, a February 13, 1975, memorandum to the homestead case file signed by the BLM land examiner stated that no evidence of clearing for cultivation was found in the field or by scanning recent aerial photographs of the area. Therefore, such information was of record prior to the filing of contest AA 8351-B, as well as contest AA 8351-A.

still clear that the contest complaint was properly dismissed on the ground of failure to allege facts not of record in the BLM files.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joan B. Thompson  
Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Joseph W. Goss  
Administrative Judge

